OPINION OF ADVOCATE GENERAL JACOBS
delivered on 16 March 1995 *

1. In these proceedings the Commission seeks a declaration that Germany has failed to fulfil its obligations under Council Directive 75/442/EEC, [1] Council Directive 78/319/EEC [2] and Council Directive 84/631/EEC, [3] as amended by Council Directive 86/279/EEC. [4] All the directives have been substantially amended or repealed during the administrative or judicial phase of the present proceedings.

The Community legislation on waste

2. Prior to the Single European Act the Treaty did not make specific provision for a Community environmental policy. The Council nevertheless adopted a series of directives on waste on the basis of Articles 100 and 235. The main Directive, Directive 75/442, sets out in the original version, which is the version relevant to these proceedings, a number of general provisions and general principles regarding waste disposal. Member States are required to take appropriate steps to encourage the prevention, recycling and processing of waste (Article 3) and to take the necessary measures to ensure that waste is disposed of without endangering human health or harming the environment (Article 4). Member States are to establish or designate the competent authority or authorities to be responsible, in a given zone, for the planning, organization, authorization and supervision of waste disposal operations (Article 5). Any installation or undertaking treating, storing or tipping waste on behalf of third parties must obtain a permit from the competent authority (Article 8) and is also subject to periodic inspections by the latter (Article 9). Undertakings transporting, collecting, storing, tipping or treating their own waste, and those which collect or transport waste on behalf of third parties, are also to be subject to supervision by the competent authority (Article 10). 'Waste' is broadly defined in Article 1(a) as any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force.

3. By virtue of Article 2(2)(f) of the Directive, waste covered by specific Community

* Original language: English.

1 — Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39.

2 — Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste, OJ 1978 L 84, p. 43.

3 — Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ 1984 L 326, p. 31.

4 — Council Directive 86/279/EEC of 12 June 1986 amending Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ 1986 L 181, p. 13.

rules is excluded from the scope of the Directive. Directive 78/319 [5] lays down specific rules for toxic and dangerous waste. As in the case of Directive 75/442 Member States are to encourage the prevention of such waste and its processing and recycling (Article 4), are to ensure its disposal without endangering human health and the environment (Article 5) and are to establish or designate competent authorities, in a given area, for the planning, organization, authorization and supervision of waste disposal operations (Article 6). Member States are to ensure that toxic and dangerous waste is kept separate from other matter, is appropriately labelled and is recorded and identified in respect of each site where it is deposited (Article 7). Member States are permitted to take more stringent measures (Article 8). A system of permits is established for installations, establishments or undertakings carrying out the storage, treatment or deposit of waste (Article 9). The competent authorities are responsible for drawing up and keeping up to date plans for the disposal of such waste. Such plans are to be made public and forwarded to the Commission (Article 12). In cases of emergency or grave danger Member States are to take steps, including temporary derogations from the Directive, to ensure the protection of the population and the environment (Article 13). Documentary requirements are imposed on persons producing, holding or disposing of such waste and with respect to identification of waste transported in the course of disposal (Article 14). A system of inspections and supervision by the competent authorities is established (Article 15).

4. It may be noted that Council Directive 76/403/EEC [6] also lays down specific rules for the disposal of polychlorinated biphenyls and terphenyls. The Directive is not directly concerned by these proceedings.

5. Directive 84/631, as amended by Directive 86/279, establishes a system of supervision and control of the transfrontier shipment of hazardous waste. 'Hazardous waste' means toxic and dangerous waste as defined in Article 1(b) of Directive 78/319, except for certain chlorinated and organic solvents, and PCB as defined in Article 1(a) of Directive 76/403. Cross-border movement of hazardous waste within the Community and exports to third countries are subject to a procedure involving notification of the competent authority of the Member State designated by the Directive as responsible for issuing an acknowledgement of the notification or raising objections. The Directive lists the grounds on which objections may be raised and, in the case of objections raised by the Member State of dispatch, distinguishes between movements between Member States and exports to third countries (Articles 3 and 4).

6. Following negotiations conducted under the auspices of the United Nations

5 — Cited in note 2.

6 — Council Directive 76/403/EEC of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls, OJ 1976 L 108, p. 41.

Environment Programme the Community signed on 22 March 1989 the Basle Convention on the control of transboundary movements of hazardous wastes and their disposal. The Convention was approved on behalf of the Community by Council Decision 93/98/EEC. [7] The preamble to the Convention refers *inter alia* to 'the increasing desire for the prohibition of transboundary movements of hazardous waste and their disposal in other States, especially developing countries', and to the conviction 'that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated'.

7. The Convention lays down a series of rules to achieve those objectives. In particular Article 4(1) precludes exports of waste to States imposing a general prohibition on imports of hazardous waste or other waste for disposal or not consenting to specific imports. Article 4(9) requires parties to ensure that the transboundary movement of hazardous wastes and other wastes is allowed only if the State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner, or if the wastes are required as a raw material for recycling or recovery industries in the State of import or is in accordance with other criteria to be decided by the parties which do not differ from the objectives of the Convention.

8. On 7 May 1990 the Council adopted a resolution [8] welcoming the international initiatives in this sphere and emphasizing the importance 'for the Community as a whole to become self-sufficient in waste disposal' and the desirability 'for Member States individually to aim at such self-sufficiency': see the fifth recital in the preamble to the resolution. The resolution called for proposals for amendment of Directive 84/631 and for early agreement by the Council on proposals for the amendment of Directives 75/442 and 78/319.

9. On 18 March 1991 the Council adopted Directive 91/156/EEC [9] substantially amending Directive 75/442. The Directive was adopted on the basis of Article 130s, [10] introduced by the Single European Act, which introduced a specific legal basis for action

7 — OJ 1993 L 39, p. 1.

8 — OJ 1990 C 122, p. 2.

9 — OJ 1991 L 78, p. 32.

10 — In Case C-155/91 *Commission* v *Council* [1993] ECR I-939, the Court held that the Directive could validly be adopted on the basis of that provision (rather than Article 100a, upon which the Commission's proposal was based).

relating to environmental protection. The amendments made by the Directive 'take as a base a high level of environmental protection': see the first recital. The Directive reinforces the obligations on Member States with respect to waste management, laying emphasis on the need to restrict the production of waste and to encourage its recycling and re-use. In keeping with the Basle Convention and the Council resolution the Directive is based on the principle of self-sufficiency as regards both the Community as a whole and Member States individually. In particular Article 5 of Directive 75/442, as amended, requires Member States to establish an integrated network of disposal installations, enabling 'the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually, taking into account geographical circumstances or the need for specialised installations for certain types of waste'.

10. On 12 December 1991 the Council also adopted Directive 91/689/EEC on hazardous waste, [11] replacing Directive 78/319.

11. On 1 February 1993 the Council replaced Directive 84/631 by Regulation (EEC) No 259/93 [12] on the supervision and control of shipments of waste within, into and out of the European Community. The Regulation, also based on Article 130s, [13] gives effect to the principles of proximity, priority for recovery and self-sufficiency embodied in Directive 75/442 at Community and national levels by allowing Member States to take measures in accordance with the Treaty to prohibit generally or partially or to object systematically to shipments of waste for disposal (Article 4(3)(a)). Exports to non-member countries of waste for disposal are largely prohibited (Article 14).

12. Finally, it may be noted that in the 'Wallonian Waste' case [14] the Court held that Belgian legislation prohibiting the deposit or discharge in Wallonia of waste originating in other Member States or other regions of Belgium was incompatible with Directive 84/631. The Directive set up a system enabling the national authorities concerned to raise objections and thus prohibit transfrontier shipments of hazardous waste on grounds relating to the protection of the environment, public policy, safety and health protection; that system left no room for the Member States to impose a general prohibition on such movements.

11 — OJ 1991 L 377, p. 20. The Directive, as amended by Council Directive 94/31/EC (OJ 1994 L 168, p. 28), repealed Directive 78/319 with effect from 27 June 1995.

12 — OJ 1993 L 30, p. 1.

13 — In Case C-187/93 *Parliament* v *Council* [1994] ECR I-2857 the Court held that the Regulation could properly be based on that provision.

14 — Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431.

13. However, in considering the compatibility of the Belgian legislation with Article 30 of the Treaty in so far as it concerned waste not covered by Directive 84/631, the Court was clearly influenced by the developments in the Community's policy on waste. While acknowledging that waste, whether or not recyclable, must be regarded as goods whose free movement, in accordance with Article 30, should not in principle be restricted, it recognized that it was also a product of a special nature inasmuch as its accumulation, even before it constituted a danger to health, was dangerous to the environment, particularly given the limited capacity of each region or area to receive it. The Belgian legislation was accordingly justified by imperative requirements relating to the protection of the environment. In response to the Commission's argument that Belgium could not rely on an imperative requirement in defence of a discriminatory measure, the Court concluded that the Belgian legislation was not discriminatory owing to the special nature of waste. The principle that harm to the environment should be remedied at source implied that it was for each region, commune or local entity to take the appropriate measures to ensure the reception, treatment and disposal of its own waste, which should be disposed of as close as possible to its place of production in order to limit the transportation thereof.

The Commission's complaints

14. The national provisions contested by the Commission are contained in the Abfallgesetz of 27 August 1986 [15] (hereinafter 'the Law') and the Abfallverbringungs-Verordnung of 18 November 1988 [16] ('the Regulation'). According to the Commission the German rules are defective in the following three respects:

(1) Certain waste destined for recycling is expressly excluded from the scope of the Law, whereas recyclable waste falls within the scope of Directives 75/442 and 78/319.

(2) The principle that waste should be disposed of in Germany laid down in Paragraph 2 of the Law and the system of authorization provided for in Paragraph 13 are not compatible with Directive 84/631; moreover, certain of the conditions for the authorization of the movement of hazardous waste are contrary to the Directive.

(3) Germany has failed to comply fully with its obligation to notify to the Commission waste disposal programmes as required by Article 12 of Directive 78/319.

15 — *Gesetz über die Vermeidung und Entsorgung von Abfällen* (BGBl. 1986 I, p. 1410).

16 — *Verordnung über die grenzüberschreitende Verbringung von Abfällen* (BGBl. 1988 I, p. 2126).

Admissibility

15. In its defence the German Government contends that the application is inadmissible. It contends first that the implementation date of 18 July 1977 for Directive 75/442 applies only to the version of the Directive applicable prior to its amendment by Directive 91/156. Under Article 2(1) of Directive 91/156, adopted before the date of the Commission's reasoned opinion, the period for implementation of the amended Directive expired on 1 April 1993; however, according to the German Government implementation is subject to the condition, laid down in Article 1(a), second subparagraph, of the amended Directive that the Commission shall 'draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I', a condition not yet fulfilled.

16. That argument must fail. The Commission's action in this case is directed against Germany's alleged failure to implement the original version of Directive 75/442. The fact that the implementation period for the subsequent amending Directive had not expired at the date of the reasoned opinion or the application is irrelevant since, as I shall explain below, the Commission's complaint concerning the implementation of Directive 75/442 applies equally, if indeed not more clearly, to the amended Directive, notwithstanding the Commission's obligation to specify the wastes belonging to the categories in Annex I. Germany can scarcely object that the Commission's action is inadmissible on the ground that the implementation period for amendments having no bearing on the Commission's complaint has not expired.

17. Secondly, the German Government considers to be out of time the complaint that the preference given by the German legislation to disposal of waste within national territory is contrary to Directive 84/631. The application was lodged long after the publication of the contested German legislation and at a time when the Community was embracing the principle of self-sufficiency with regard to waste disposal, as is reflected in the Court's judgment in the 'Wallonian Waste' case and in Regulation No 259/93, repealing Directive 84/631. Germany was therefore entitled to expect that the Commission would not institute proceedings in respect of Directive 84/631.

18. It is certainly surprising that the Commission should have decided to bring or continue its action in the knowledge that the Community had already amended Directive 75/442, and was about to replace Directive 84/631, in order to take account of the principle of self-sufficiency in waste disposal embodied in the Basle Convention. Nor has the Commission given any satisfactory explanation for continuing the proceedings. It has not, for example, suggested that it was necessary to pursue its action in order to

obtain a ruling on an important point of interpretation or to establish a basis for claims against Germany in respect of Directive 84/631.

19. Nevertheless the action must be considered admissible. Directive 84/631 was still in force at the date of the reasoned opinion (and indeed also at the date of the application to the Court). As the Court has held:

'It is for the Commission, under Article 169 of the Treaty, to judge at what time it shall bring an action before the Court; the considerations which determine its choice of time cannot affect the admissibility of the action, which follows only from objective rules.' [17]

20. Moreover, in the co-insurance cases, the Court held that:

'The mere fact that a proposal for a legislative measure, which if adopted and transposed into national law would terminate the infringements alleged by the Commission, has already been submitted to the Council does not prevent the Commission from bringing such an action.' [18]

21. I therefore consider the application to be admissible.

Substance

(1) Complaint concerning the definition of waste in the Law

22. The Commission contends that the definition of 'waste' in Paragraph 1 of the Law is narrower than the definition in the Community legislation. In particular, Paragraph 1(3), point 7, of the Law provides that the Law does not apply to certain categories of recyclable waste and hence is incompatible with Directives 75/442 and 78/319, which cover both recyclable and non-recyclable waste.

17 — Judgment in Case 7/68 *Commission* v *Italy* [1968] ECR 423, p. 428.

18 — Paragraphs 7 of the judgments in Case 220/83 *Commission* v *France* [1986] ECR 3663, Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, Case 206/84 *Commission* v *Ireland* [1986] ECR 3817. See also the judgment in Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, paragraph 5.

Article 1(a) of Directive 75/442 defines 'waste' as:

'any substance or object which the holder disposes of [19] or is required to dispose of pursuant to the provisions of national law in force.'

23. That definition is repeated in Article 1(a) of Directive 78/319, although that Directive applies only to 'toxic and dangerous' waste as defined in Article 1(b) of the Directive.

24. The Commission does not take issue with the general definition of 'waste' in Paragraph 1(1) of the Law. That provision states:

'For the purposes of this Law "waste" shall mean movable objects which the owner wishes to discard or the proper disposal of which is required in order to safeguard the public interest, in particular the protection of the environment. Movable objects which the owner disposes of to the body responsible for waste disposal or a third party authorized by it constitute waste even in the case of commercial exploitation until they or the materials or energy produced from them are introduced into commercial channels.'

25. However, Paragraph 1(3) provides that the Law does not apply to:

'7. Materials, other than those covered by Paragraphs 2(2) and (3), 5, 5a and 15, which by means of commercial collection are exploited in accordance with the Regulations in force, provided that evidence thereof is provided to the bodies responsible for waste disposal and overriding public interest does not otherwise require.'

26. Paragraph 1(3), point 6, contains a similar, although not identical, exemption for the non-commercial collection of waste materials.

27. It may be noted that the effect of the reference in Paragraph 1(3), points 6 and 7, to Paragraph 2(2) is to retain within the scope of the Law waste from commercial or industrial undertakings or public establishments which 'according to its nature, composition or quantity is particularly liable to harm

19 — The corresponding term in the French version is 'se défait'. In the amended Directive, this is translated as 'discards'. The amended version of Article 1(a) reads: '"waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

health, air or water, is explosive or inflammable or may contain or produce matters causing transmissible diseases'. It seems to me therefore that the Commission has not established that the exemption in Paragraph 1(3), point 7, is contrary to Directive 78/319, which is solely concerned with toxic and dangerous waste, categories which would appear to be excluded from the scope of the exemption.

28. There remains the question whether the German definition is in conformity with Directive 75/442. In its pleadings the German Government refers to a ruling of the Bundesgerichtshof indicating that the concept of waste is to be construed broadly in the light of the relevant Community provisions and case-law and to a draft law designed to secure formal amendment of the definition of waste in the German legislation. Nevertheless in its rejoinder the German Government refers to its communication of 20 March 1992 replying to the reasoned opinion, where it acknowledges that Paragraph 1(3), point 7, applies wherever goods are made available for commercial collection, the rationale being that the objective intention of the owner of the goods in such cases is to dispose of economic goods rather than waste.

29. In my view Paragraph 1(3), point 7, is contrary to Directive 75/442 in both its original and its amended forms. It is clear that the scope of Directive 75/442 extends to waste collected for the purpose of recycling or reuse. As the Court held in *Vessoso and Zanetti*: [20]

'It is clear ... that a substance of which its holder disposes may constitute waste within the meaning of Directives 75/442 and 78/319 even when it is capable of economic reutilization.'

30. Directive 75/442, even in its original form, requires Member States to establish a comprehensive system for waste management. As part of that system Member States must ensure that any holder of waste either disposes of it himself in a manner which neither endangers human health nor harms the environment or entrusts its disposal to a private or public waste collector or disposal undertaking (Article 7). The Directive introduces a system of permits, together with inspections, for installations or undertakings treating, storing or tipping waste on behalf of third parties (Articles 8 and 9). Undertakings dealing with their own waste and those which collect or transport waste on behalf of third parties are subject to supervision by the competent authority (Article 10).

20 — See Joined Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1990] ECR I-1461, paragraph 8 of the judgment. See also Case C-359/88 *Zanetti & Others* [1990] ECR I-1509, paragraphs 12 and 13.

31. The system of supervision established by Directive 75/442 was reinforced by Directive 91/156. Under Article 8 of Directive 75/442 as amended Member States must ensure that any holder of waste either recovers or disposes of it himself in accordance with the provisions of the Directive or has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex IIA or B. Annex IIA concerns disposal operations. Annex IIB covers operations which may lead to recovery and lists a series of processes such as the recycling of materials, recovery of components, use for generating energy and so forth.

32. Any establishment or undertaking carrying out the operations listed in Annex IIB must obtain a permit (Article 10). By virtue of Article 12 establishments or undertakings which collect or transport waste on a commercial basis or which arrange for the disposal or recovery of waste on behalf of others must, where they are not subject to authorization, be registered with the competent authorities. Moreover, under Article 13 they are to be subject to appropriate periodic inspections by the competent authorities.

33. It is clear therefore that the system of supervision and management established by the Directive is intended to cover all objects and substances discarded by their owner, even if they have a commercial value and are collected commercially for re-cycling or re-use.

34. It may be true that, as the German Government suggests, it is sometimes difficult to distinguish between the discarding of recyclable or re-usable waste and the disposal of used goods in the ordinary course of business, since in both cases the goods are no longer required by the owner but none the less have a commercial value. However, the difficulty of distinguishing between marginal cases cannot justify the general exclusion of non-hazardous materials collected for re-use, including materials collected in bulk, from the definition of waste.

35. I conclude that, by excluding certain categories of recyclable waste from the scope of the Law, Germany is in breach of its obligation to implement Directive 75/442 but not in breach of its obligation to implement Directive 78/319.

(2) Cross-border movement of hazardous waste

36. During the pre-litigation phase the Commission put forward the general complaint that Paragraph 2 of the Law, which

establishes the principle of elimination of waste in Germany, and Paragraph 13 of the Law, requiring authorization for cross-border movement of waste, were contrary to the principle of free movement of waste. However, in the light of the judgment in the 'Wallonian Waste' case [21] it has abandoned that contention in its application to the Court. Its second head of complaint is therefore limited to the contention that the system of authorization of shipments of hazardous waste established by the Law and the Regulation is inconsistent with Directive 84/631, as amended by Directive 86/279.

37. By virtue of Article 5 of Directive 78/319:

'1. Member States shall take the necessary measures to ensure that toxic and dangerous waste is disposed of without endangering human health and without harming the environment, and in particular:

— without risk to water, air, soil, plants or animals;

— without causing a nuisance through noise or odours;

— without adversely affecting the countryside or places of special interest.

2. Member States shall in particular take the necessary steps to prohibit the abandonment and uncontrolled discharge, tipping or carriage of toxic and dangerous waste, as well as its consignment to installations, establishments or undertakings other than those referred to in Article 9(1).'

38. Article 9(1) introduces a system of permits for installations, establishments or undertakings involved in the storage, treatment or deposit of toxic and dangerous waste.

39. Article 12 requires the competent authorities to draw up a plan for the disposal of toxic and dangerous waste, covering in particular the type and quantity of waste, the methods of disposal, specialized treatment centres and suitable disposal sites.

40. Article 1 of Directive 84/631 reflects the obligation imposed on Member States by

21 — Cited above in note 14.

Article 5 of Directive 78/319 by providing that:

'Member States shall, in accordance with the provisions of this Directive, take the necessary measures for the supervision and control, with a view to the protection of human health and the environment, of the transfrontier shipment of hazardous waste both within the Community and on its entering and/or leaving the Community.'

41. Articles 3 and 4 of Directive 84/631, as amended, provide:

'*Article 3*

1. Where the holder of the waste intends to ship it or to have it shipped from one Member State to another, to have it routed through one or more Member States, or to ship it to a Member State from a third State or from a Member State to a third State, he shall notify the competent authority of the Member State responsible for issuing the acknowledgement of receipt, with a copy to the competent authorities of the other Member States concerned and, where applicable, to the third State of destination and/or the third State(s) of transit.

2. Notification shall be effected by means of a uniform consignment note, hereinafter referred to as the "consignment note", to be drawn up in accordance with Article 15 and the contents of which are set out in Annex I.

3. When so notifying the competent authority of the Member State responsible for issuing the acknowledgement of receipt, the holder of the waste shall provide it with satisfactory information on the following in particular:

...

4. In the case of a shipment from a Member State to a third State, the holder of the waste shall obtain the agreement of the third State of destination before embarking upon the notification procedure provided for in paragraph 3. The notification must include satisfactory information on such agreement.

Article 4

1. Transfrontier shipment may not be effected before the competent authorities of

the Member States referred to in paragraph 2(a), (b) or (c) have acknowledged receipt of the notification. The acknowledgement shall be entered on the consignment note.

2. Not later than one month after receipt of the notification, the acknowledgement of receipt or any objection raised in accordance with paragraph 3 shall be forwarded to the holder of the waste:

(a) either by the competent authority of the Member State of destination;

(b) in the case of shipments of waste from a third State in transit through the Community for disposal outside the Community, by the competent authorities of the last Member State through which the shipment is due to pass; or

(c) in the case of shipments of waste from a Member State for disposal outside the Community in a third State, by the competent authorities of the Member State of dispatch, except in the case provided for in the last subparagraph of this paragraph ...

with a copy to the consignee of the waste and to the competent authorities of the other Member States concerned, and where applicable, to the third State of destination and the third State(s) of transit.

Where the waste is disposed of in a third State bordering on the last Member State of transit, the latter shall be entitled to issue the acknowledgement of receipt or to raise any objection in place of the Member State referred to in (c). A Member State of transit intending to exercise the right conferred upon it in this subparagraph shall communicate it to the Commission and other Member States. It may not exercise this right earlier than three months following such communication.

3. Objections must be substantiated on the basis of laws and regulations relating to environmental protection, public policy and public security or health protection which are in conformity with this Directive, with other Community instruments or with international conventions on this subject concluded by the Member State concerned prior to notification of this Directive.

6. Without prejudice to paragraphs 1 and 2, the competent authorities of the Member State of dispatch, and those of the Member State or States of transit, if any, shall have 15 days following the notification in which to lay down, if appropriate, conditions in respect of the shipment of waste in their national territory. These conditions, which shall be forwarded to the holder of the waste, with a copy to the competent authorities of the Member States concerned, may not be more stringent than those laid down in respect of similar shipments effected wholly with the Member State in question and shall take due account of existing agreements. The holder of the waste must comply with these conditions to be able to carry out shipment.

Not later than 20 days after receipt of the notification, the competent authorities of the Member State of dispatch may raise objections on the grounds that the shipment of waste adversely affects the implementation of plans drawn up pursuant to Article 12 of Directive 78/319/EEC or Article 6 of Directive 76/403/EEC or that it conflicts with obligations resulting from international agreements on this subject concluded by it prior to notification of this Directive. Such objections shall be forwarded to the holder of the waste with a copy to the competent authorities of the Member States concerned.'

42. The relevant German rules are contained in Paragraphs 2 and 13 of the Law and in the Regulation, adopted *inter alia* on the basis of Paragraph 13c of the Law, which empowers the German Government to make Regulations applying and adapting the provisions of Paragraph 13 for the purpose of implementing Community legislation, in particular Directive 84/631.

43. Paragraph 2(1) of the Law provides:

'Waste covered by the provisions of this Law must be disposed of in Germany unless otherwise provided by Paragraph 13. The waste should be disposed of in a manner which does not harm the public interest ... .'

44. Paragraph 13(1) provides:

'A person who wishes to transport waste out of or through the territory to which the present Law applies must obtain

authorization from the competent authority. Such authorization may be granted only if:

1. the transport, treatment, storage or deposit of the waste is not likely to harm the public interest;

...

4. in the event of waste being transported out of the territory to which the present Law applies,

(a) no suitable installations for disposal of the waste are available in the *Land* in which the waste was produced, and the use of waste disposal installations of another *Land* is not possible or would involve undue hardship for the person obliged to dispose of the waste; this does not apply if waste disposal plans under Paragraph 6(1) or (3) provide for disposal of the waste outside the territory to which the present Law applies,

(b) ...

(c) the elimination of the waste in the recipient State is not liable to harm the public interest in the territory to which the present Law applies.'

45. Paragraph 8 of the Regulation provides:

'An unrestricted authorization procedure under Paragraph 13 of the Law shall apply:

(a) ...

(b) where dangerous waste is transported out of the territory to which the Law applies to a State which is not a member of the European Communities;

(c) ... .'

46. By contrast Paragraph 10 of the Regulation provides:

'A restricted authorization procedure shall apply:

(a) in the case of the transport of dangerous waste out of the territory to which the Law applies to a Member State of the European Communities,

... .'

47. Paragraph 11 of the Regulation provides:

'The competent authority shall examine in the course of the authorization procedure under Paragraph 10

(1) the lawfulness of the shipment and the reliability of the persons responsible for it (Paragraph 13(1), points 1 and 2, of the Law),

(2) whether the disposal of the waste in the recipient State may harm the public interest in the territory to which the Law applies (Paragraph 13(1), points 4(c) and 5),

(3) whether the transport of the waste outside the territory to which the Law applies complies with existing waste disposal plans or similar provisions of the *Land*.'

48. It may thus be noted that the requirement in Paragraph 13(1), point 4(a), that the waste cannot adequately be disposed of in Germany does not apply in the case of exports of waste to other Member States.

49. In contrast to the Directive, which provides for a system of notification and acknowledgement, the German rules prohibit disposal of waste outside Germany unless expressly authorized under Paragraph 13. However, Paragraph 7 of the Regulation provides that an application for authorization under Paragraph 13 of the Law corresponds to a 'notification' under Article 3 of the Directive, and that an authorization under Paragraph 13 corresponds to an 'acknowledgement' under Article 4(1).

Similarly, a negative decision under Paragraph 13 corresponds to an 'objection' under Article 4(3) or (6) of the Directive, and a limited authorization to the imposition of 'conditions' under Article 4(6).

50. The Commission maintains that, notwithstanding those adaptations of the authorization procedure, the Law and the Regulation do not correctly implement the Directive. It contends first that the principle that waste must be disposed of in Germany, embodied in Paragraph 2 of the Law, is incompatible with the provisions of Directives 84/631 and 86/279. Secondly, it considers that the requirement of authorization for any cross-border movement of waste laid down in Paragraph 13(1) is contrary to Directive 84/631; the right to move waste granted by the Directive is reduced to the possibility of authorization subject to certain conditions being fulfilled. Thirdly, it objects to two of the specific conditions for authorization of the cross-border movement of waste. In relation to movements to other Member States, it objects to the requirement, in Paragraph 13(1), point 4(c), that the disposal of the waste in the State of destination should not be liable to harm the public interest in Germany. In relation to exports to non-member countries, it objects both to that requirement and to the requirement that disposal of waste within the *Land* in which it is produced must be impossible and that the disposal of waste in another *Land* must be impossible or involve undue hardship for the person obliged to dispose of the waste.

51. In my view, all of those complaints must fail. First, I do not think it is possible to consider Paragraph 2 of the Law in isolation, as the Commission seeks to do. Paragraph 2 states that waste must be disposed of in Germany 'unless otherwise provided by Paragraph 13'. The compatibility of the provisions of the Law with the Directive can be assessed only by reading Paragraph 2 together with Paragraph 13, which allows cross-border movement of waste to be authorized on certain grounds.

52. Secondly, I do not consider that the imposition of a requirement of authorization is in itself contrary to the Directive. As we have seen, an authorization under the Law is declared to be equivalent to an 'acknowledgement' of notification within the meaning of the Directive, and the refusal of authorization is declared to be equivalent to an 'objection'. Accordingly, as long as authorization is granted whenever acknowledgement is required to be given under the Directive, and is refused only where an objection can legitimately be raised, authorization under the Law is equivalent to acknowledgement under the Directive. The only question to be considered, therefore, is whether the criteria for granting such authorization are consistent with the requirements of the Directive.

53. I turn therefore to the specific conditions for authorization of movements of waste to

other Member States and non-member countries.

(a) Movements of waste to another Member State

54. The Commission objects to the requirement in Paragraph 13(1)(4)(c) of the Law that the movement of waste should not involve any risk of harm to the public interest in Germany. In its communication of 20 March 1992 replying to the reasoned opinion the German Government states that the concept of public interest encompasses the protection of environment. This is consistent with Paragraph 1 of the Law which, as already noted, states that for the purposes of the Law 'waste' means 'movable objects which the owner wishes to discard or the proper disposal of which is required in order to safeguard the public interest, in particular the protection of the environment'.

55. The Commission's complaint therefore amounts to the somewhat surprising contention that, in approving the disposal of hazardous waste produced in Germany in another Member State, the German authorities are precluded by Directive 84/631 from taking account of the environmental impact of the disposal on German territory. The Commission justifies that contention on the basis that Article 4(6) of the Directive merely allows the Member State of dispatch to lay down conditions in respect of the shipment of waste in their national territory and to raise objections on the ground that the shipment adversely affects the implementation of plans drawn up pursuant to Article 12 of Directive 78/319 or Article 6 of Directive 76/403 or that it conflicts with obligations resulting from international agreements concluded by it prior to the notification of the Directive.

56. As already noted, however, Article 12 of Directive 78/319, to which Article 4(6) of Directive 84/631 refers, provides that plans for the disposal of toxic and dangerous waste are to cover such matters as the methods of disposal, specialized treatment centres and suitable disposal sites. The drawing up of such plans is a specific instance of the general obligation imposed by Article 5 to take the necessary measures to ensure that toxic and dangerous waste is disposed of without endangering human health and without harming the environment in particular 'without risk to water, air, soil, plants or animals; without causing a nuisance through noise or odours; without adversely affecting the countryside or places of special interest'.

57. It is entirely possible that the disposal of hazardous waste in another Member State, particularly an adjacent Member State, may have serious environmental consequences in Germany within the meaning of Article 5. It

seems to me that, where such a risk exists, Germany is not merely entitled, but is under an obligation, to refuse the shipment in question.

58. It may be noted that the Commission has not adduced any evidence to show that the German authorities have interpreted the condition in question excessively broadly so as to prevent the transport of waste in circumstances where there was no environmental threat in Germany.

(b) Exports to non-member countries

59. As regards authorization of exports of waste to non-member countries the Commission objects to two conditions:

First, the condition, already considered in relation to movements to other Member States, that there should be no risk of harm to the public interest in Germany (Paragraph 13(1)(4)(c)); secondly, the requirement that there must be no suitable disposal site in the *Land* in which the waste is produced and the use of waste disposal installations in another *Land* must be impossible or involve undue hardship for the person obliged to dispose of the waste (Paragraph 13(1)(4)(a)). As already noted, by virtue of Paragraphs 10 and 11 of the Regulation the latter requirement does not apply to movements of waste between Member States.

60. By virtue of Article 4(2)(c) of the Directive, in the case of shipments for disposal outside the Community, the Member State responsible for issuing the acknowledgements of receipt under Article 4(2) is the Member State of dispatch, unless the last Member State of transit upon which the non-member country borders exercises its option to issue the acknowledgement of receipt or raise any objection in place of the Member State of dispatch. The grounds on which a Member State may object to exports outside the Community are somewhat broader than for intra-Community movements. The objections raised must, under Article 4(3), 'be substantiated on the basis of laws and regulations relating to environmental protection, public policy and public security or health protection which are in conformity with this Directive, with other Community instruments or with international conventions on this subject concluded by the Member State concerned prior to notification of this Directive'.

61. As in the case of exports to other Member States, the Member State of dispatch may

also raise objections under Article 4(6), in particular with respect to the adverse effect on waste disposal plans drawn up under Article 12 of Directive 78/319 or Article 6 of Directive 76/403.

62. I have already concluded that environmental interests in Germany may be protected under Article 4(6) as part of waste disposal plans drawn up under Directives 78/319 and 76/403. In view of the broad wording of Article 4(3), such interests may, in the case of exports to non-member countries, also be protected under that provision.

63. As regards the second requirement (in Paragraph 13(1)(4)(a)), there seems little doubt that that provision is in conformity with the present text of Directive 75/442, as amended by Directive 91/156 adopted during the pre-litigation proceedings. The preamble to the amending Directive refers to the goal of self-sufficiency for the Community and individual Member States in waste disposal, [22] and the new Article 5(1) requires Member States to establish a network of disposal installations which enables 'the Community as a whole to become self-sufficient in waste disposal and the Member States to move towards that aim individually'. Similarly, the new Article 7(3) enables Member States to take the measures necessary to prevent movement of waste not in accordance with their waste management plans, such plans being established for the purposes, *inter alia*, of the objectives of Article 5.

64. Moreover, it would appear that the German provision is consistent with the purpose of Regulation No 259/93, which replaced Directive 84/631 after the present proceedings were brought. Indeed that Regulation goes further than the German legislation at issue in this case, by in principle prohibiting exports of waste for disposal to non-member countries: see Article 14.

65. The question remains whether the requirement was compatible with Directive 84/631.

66. As already noted, in the 'Wallonian Waste' case the Court held that a general ban on imports of hazardous waste into Wallonia was contrary to the Directive, being inconsistent with the system for control of cross-border movement established by the

22 — See the seventh recital in the preamble to Directive 91/156.

Directive. [23] The issue here however is somewhat different, namely whether it is permissible for a Member State to refuse export of waste to a non-member country on the ground that the waste can adequately be disposed of in Germany. Unlike a general ban on importation, the German measure does not render meaningless the system of control established by the Directive.

67. It may be noted that at the time of the adoption of Directive 84/631 the Treaty contained no specific legal basis for environmental measures. The Directive was therefore based on Articles 100 and 235. As is to be expected in the case of a measure based partly on Article 100, the preamble to the Directive refers to possible 'distortion of conditions of competition' directly affecting 'the functioning of the common market'. [24] The sixth recital in the preamble also states that the system of control 'should neither create barriers to intra-Community trade nor affect competition'.

68. For the rest, however, the emphasis is firmly on environmental protection. That the shipment of hazardous waste to other Member States or outside the Community was envisaged only where this represented the most effective means of disposal is suggested by the third recital in the preamble, which states:

'Whereas the shipment of waste between Member States, or between Member States and other States, may be necessary in order to dispose of it under the best possible conditions ... .'

69. It may also be noted that the preamble makes no reference to obstacles to trade with non-member countries. Moreover, as already noted, in the case of shipments for disposal outside the Community, Article 4(3) allows Member States to object on the basis of laws and regulations relating *inter alia* to environmental protection. Consequently, although not allowing or, like Regulation No 259/93, requiring Member States to impose a general prohibition on exports of waste for disposal in non-member countries, Directive 84/631 may in my view be interpreted as allowing a Member State to object to the export of waste to a non-member country on environmental grounds where the waste could be disposed of adequately in Germany in accordance with waste disposal plans drawn up under Directives 78/319 and 76/403.

23 — Cited above in note; see in particular paragraph 20 of the judgment.

24 — See the fourth recital.

70. It follows that all the Commission's complaints relating to the cross-border movement of hazardous waste must be rejected.

(3) The failure to submit waste disposal plans

71. As already noted, Article 12 of Directive 78/319 requires Member States to forward to the Commission plans for the disposal of toxic and dangerous waste which the competent authorities are required to draw up, keep up to date and make public.

72. The Commission notes that by a letter of 12 November 1988 Germany submitted to the Commission a series of plans for the *Bundesländer*. It claims that Germany had nevertheless failed to comply with Article 12 in the following respects:

— in the case of Nordrhein-Westfalen only a plan for Düsseldorf was submitted;

— no plan was submitted for Bremerhaven;

— for Baden-Württemberg only a draft was submitted;

— for Hessen, Lower Saxony, Rheinland-Pfalz, Bremen and the Saarland the plans were not updated, whereas the Commission received a new plan for Hamburg dated 9 February 1990;

— the plans for Bavaria, Berlin, Hessen, Lower Saxony and Rheinland-Pfalz do not appear to have been published.

73. In its application the Commission rejected the German Government's view that there was no infringement because Article 12 of the Directive did not stipulate a date for drawing up and updating the plans; Article 21 of the Directive laid down a time-limit for implementation of the Directive of 24 months from the date of its notification.

74. By a communication of 26 May 1993 the German Government supplemented the annexes to its defence by submitting details of certain waste plans. In its rejoinder the government acknowledges that some of the plans were notified late, adding that it had none the less complied to a very large extent with its obligation under Article 12. At the hearing the Commission, while reminding

the Court that the date for compliance was that fixed in the reasoned opinion, claimed that there remained certain deficiencies in the plans.

75. I share the Commission's view that, in the absence of a specific date for drawing up, publishing and notifying plans under Article 12, it must be presumed that Member States were required to comply with those obligations within the period for implementation of the Directive laid down in Article 21, i. e. within two years from the notification of the Directive. In addition Article 12 imposes a continuing obligation to keep plans up to date.

76. It seems clear that, although the German Government has to a very large extent complied with its obligations under Article 12, the Commission is correct in its assertion that at the date specified in the reasoned opinion, i. e. 25 November 1991, implementation was deficient in certain respects. The German Government's communication of 26 May 1993 appears to confirm that:

— in the case of Nordrhein-Westfalen certain plans had not been drawn up or notified;

— in certain respects at least Bremerhaven was not covered by waste plans drawn up in respect of the *Land* of Bremen;

— definitive plans had not been adopted for Baden-Württemberg.

77. Nor has the German Government refuted the Commission's complaint that certain plans were either not updated or not published.

78. The Commission's complaint must therefore be upheld.

79. Before concluding, I must express reservations about the Commission's decision to commence and to maintain this action. The Commission's first claim, while not unfounded, has not disclosed any grounds for real concern for the environment. As for the second claim, which seems to have been the principal reason for bringing the action, I consider that the developments in the Community's environmental policy which have taken place, as I have pointed out, since the proceedings were initiated, could well have

led the Commission to withdraw that claim. The third claim, while it has identified certain relatively minor infringements, was scarcely such as to justify the resources required for an action of this kind. The Commission should in my view be encouraged to launch proceedings of this kind only after a careful assessment of its priorities, with a view to making the best use of the limited resources of the Court, the Member States and the Commission itself.

Costs

80. Since the parties have succeeded on some heads and failed on others, they should be ordered to bear their own costs pursuant to Article 69(3) of the Rules of Procedure.

Conclusion

81. Accordingly, I am of the opinion that the Court should:

(1) Declare that, by excluding certain categories of recyclable waste from the scope of its legislation, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 75/442/EEC;

(2) Declare that, by failing to draw up, keep up to date, publish or notify to the Commission plans for the disposal of toxic and hazardous waste for certain regions, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 78/319/EEC;

(3) For the rest, dismiss the application as unfounded;

(4) Order the parties to bear their own costs.